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In the

Supreme Court of the United States

OCTOBER TERM 1960

No. 410

OVE GUSTAVSSON CONTRACTING COMPANY, INC.,

Petitioner,

against

FRANKLIN G. FLOETE, Administrator of General Services Administration and MICHAEL BRENNAN, Contracting Officer, and Chief, Design and Construction Division, Public Buildings Service, General Services Administration,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit and its denial of the petition for re-hearing, in this case.

(a) Decisions Below

The judgment of the United States District Court for the Southern District of New York dismissing the complaint on motion of respondents herein was entered on the 16th day of June, 1959. The decision of the United States Court of Appeals for the Second Circuit affirming said judgment was made and entered the 25th day of May, 1960. The petition for re-hearing was denied by the same Court on the 15th day of June, 1960. Judgment of Affirm-

ance was entered in the Office of the Clerk of the District Court on July 15, 1960. There is no order extending petitioner's time to file for certiorari. The District Court's opinion is reported at 176 F. Supp. 544. The opinion of the Court of Appeals is reported at 278 F. 2d 854.

(b) Jurisdiction

This case presents important questions of Federal Law involving the Administrative Procedure Act (5 U.S.C.A. 1009) and the Wunderlich Act (41 U.S.C.A. 321) which have not been, but should be, settled by this Court; that the Courts below in deciding the federal questions involved, failed to follow the principles enunciated by this Court and by the United States Court of Appeals, 9th Circuit, in other cases, not quite similar on the facts but calling for the same principles of law for decision.

Jurisdiction is conferred upon this Court by virtue of the provisions of Title 28 U.S.C.A., Sec. 1254, subdivision (1).

(c) Questions Presented for Review

1. Whether petitioner, a general contractor, having a contract to construct a hutment for General Services Administration was entitled to a judicial review of the "contracting officers' " decision terminating the contract, where the admitted facts are that said officer has acted arbitrarily and beyond the scope of his authority, or whether its sole remedy was a breach of contract action against the principal, the United States of America.

2. Whether the Administrative Procedure Act, 5 U.S.C.A. 1009 confers any jurisdiction upon the District Courts to review and grant the relief prescribed by said act or whether the jurisdiction of the Court of Claims set forth under 28 U.S.C.A., Sec. 1346 excludes judicial review by the Federal District courts.

3. Whether under the circumstances of this case, there must be an exhaustion of the appeal procedures stated in the contract between the petitioner and the United States Government before a judicial review, if one is available, could be had of the decision sought to be reviewed.

(d) Statutes Involved

The Administrative Procedure Act, 5 U.S.C.A. 1009, the Tucker Act, 28 U.S.C.A., Section 1346 subdivision (2), and the Wunderlich Act, 41 U.S.C.A., Section 321.

The pertinent provisions of 5 U.S.C.A., Section 1009 are:

"*Judicial review of agency action.*

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of review.

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings.

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declatory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts reviewable.

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Relief pending review.

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings."

28 U.S.C.A. Section 1346, subdivision (2) reads as follows:

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * * * *

(2) Any other civil action or claim against the United States, not exceeding $10,000.00 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

41 U.S.C.A., Section 321, reads as follows:

"321. Limitation on pleading contract—provisions relating to finality; standards of review."

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: Provided, however, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

(e) Statement

On or about June 1, 1958, petitioner, a general contractor, with offices in the Borough of Queens, City and State of New York, contracted in writing with the United States of America to construct a hutment at Burlington, New Jersey, for $47,000 (20a).* This hutment was to be a compartment made of sheet metal, contained within another building, wherein temperatures would be controlled for the purposes of storing equipment (20a, p. 26 this petition). The hutment was to be placed within a government ware-

* Citations are to Appendix in Record of Court of Appeals, unless otherwise specified.

house for General Services Administration. The respondent Franklin G. Floete is the Administrator of General Services Administration. The respondent Michael Brennan is Chief of Design and Construction, Public Buildings Service of General Services Administration (5a). He is also the "Contracting Officer" named in the construction contract aforesaid. The hutment was to be completed by October 2, 1958 (14a). Completion date was extended (15a, 16a, 21a). Petitioner entered upon the performance of the contract and while duly performing and when he was 80% complete, certain disputes having arisen, on January 12, 1959, the respondent Michael Brennan, without hearing, decided that petitioner had defaulted on the contract and declared the contract to be terminated, locked petitioner from the job and seized all of petitioner's tools, materials, equipment, machinery and supplies, which were on the job-site (20a).

Said decision (17a, 18a) reads as follows:

> "In view of your failure to satisfactorily execute and complete the contract in the amount of $47,000, awarded to you on May 28, 1958 at Burlington, New Jersey, your right to proceed with the work is hereby terminated. The custodian of the building has been directed to forbid you and your representatives admission to the premises and to take possession of all tools, materials, machinery, etc., belonging to you at the site. You are advised that an inventory of the work in place and all materials on the site will be made, on Wednesday, January 14th, A.M. All excess costs incurred by reason of your default, will be charged to you."

Petitioner thereupon duly appealed the decision of Brennan to the head of the department and demanded that he be permitted to perform the job pending such appeal (7a, 24a).

This demand was made pursuant to paragraph 6 of the contract reading (23a, 24a) as follows:

> "Disputes. Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the head of the department, and the decision of the head of the department or his duly authorized representatives for the hearings of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, be final and conclusive: Provided, that, if no such appeal to head of the department is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision."

Respondents refused to allow petitioner to continue the performance of the job in spite of the appeal so pending and implemented such refusal by putting out new invitations to bid and by demanding payment of the excess cost incurred by the government in reletting the contract. The new invitation to bid was issued on February 5, 1959 (8a). Its terms provided that petitioner's material and equipment which was on the job-site might be disregarded or be discarded by the bidder and that such material and

equipment as was discarded and replaced may be removed by the bidder and retained by the bidder as his own property (8a). Also said invitation stated that the steel then assembled and erected by the petitioner did not meet the specifications of the government, but said invitation failed to specify what part of the labor performed by the petitioner should be acceptable and what part unacceptable by the bidder or what material should be furnished and labor supplied to complete the job as specified in the written contract of the government with petitioner. Instead, said invitation to bid left it to the uncontrolled judgment of the bidder to decide what materials and labor met with the specifications of petitioner's contract and what else was required to complete the job (8a, 9a).

Thereupon, this action was commenced by the personal service of a summons and complaint upon Brennan (3a), a second copy being served upon the Attorney General (3a), and a third copy being served upon Franklin G. Floete at his offices in Washington, D. C., by leaving a true copy thereof personally with his general counsel, Charles Gasque, in accordance with Rule 4(d) (5) of the Rules of Federal Civil Procedure (11a). Simultaneously with the commencement of the action, petitioner moved for an order enjoining respondents from accepting and acting upon the bids received on the invitations of February 5, 1959, and from interfering with petitioner's continued performance of the contract pending its appeal to the head of the department and from petitioner's repossession of its tools, equipment and machinery and permitting petitioner to photograph the work done at the job-site (25a). The District Court by Hon. David M. Edelstein denied the request to restrain respondents from accepting and acting upon the bids to the invitations of February 5, 1959, from interfering with petitioner's continued performance of the job pending its appeal aforesaid but directed the return of the tools, equipment and machinery and the taking of the pictures as requested by petitioner (25a, 26a). An appeal

was taken from said order of Mr. Justice Edelstein to the Court of Appeals and motion was made to the Hon. Sterry R. Waterman, one of the judges of that court for a temporary stay to perpetuate the status quo, pending such appeal, which was denied by Mr. Justice Waterman without prejudice to the renewal of such application to the court *en banc* (26a). During the discussions before Judge Waterman, the United States Attorney appeared to have consented to a preference in the trial of this case. Petitioner thereupon moved for such preference but the respondents moved for a dismissal of the action. The petitioner's motion for preference was denied, whereas respondents' motion to dismiss which was returnable before another judge was granted after a lapse of more than 60 days (26a; 20a, 4a). In the meantime, respondents accepted the lowest bid on the invitations of February 5, 1959, re-let the contract and the same was subsequently completed (p. 26 this petition).

The motion to dismiss was granted in the District Court because of improper jurisdiction of the parties defendant. Petitioner appealed to the Court of Appeals (3a, 4a). Respondents did not support the District Court judge's grounds of dismissal and instead argued that the Court of Appeals should affirm the dismissal on the ground that the instant action is not one for judicial review but is an unconsented suit against the United States and that in any event, the pendency of the appeal to the head of the department prevents the bringing of the action (p. 32 this petition). The Court of Appeals adopted these latter grounds and affirmed the dismissal. Petitioner feels aggrieved and desires a review thereof to the end that its right to bring this suit shall be determined in its favor.

The Complaint

In its first paragraph (5a-11a), the complaint alleges that this suit was being brought under the Administrative Procedure Act, 5 U.S.C.A. 1001, *et seq.* It further alleges the

making of the contract, the almost completed performance thereof by petitioner, and that acting outside the scope of his authority, the respondent Brennan did on January 12, 1959, decide that petitioner was in default on said contract and that by reason thereof, it held the contract terminated and further that petitioner was locked out from the job-site and its materials, machinery, tools and equipment which were on the job-site were thereby seized; that said decision by Brennan was arbitrary, capricious and outside the scope of said respondent's authority; that petitioner had appealed to the head of the department from said decision of Mr. Brennan; that petitioner had demanded to be permitted to continue the performance of the contract pending said appeal; that respondents had refused to allow petitioner to continue the performance of the contract; that the contract gave petitioner the right to proceed with the contract pending such appeal; that on February 5, 1959, respondent Brennan issued a new invitation to re-bid the job which invitations provided:

(a) That any and all equipment belonging to the petitioner on the site may be disregarded or discarded or replaced may be removed by the bidder and retained by the bidder as his own property;

(b) That the steel assembled or erected does not meet the specifications of the government without specifying clearly what part actually met with the specifications of the government but leaving the decision in that matter to the sole discretion of the bidder;

(c) That said actions of the respondents were arbitrary and capricious and beyond the scope of their power and authority to decide and to do; that they were violative of the rights of the petitioner; and that irreparable and immediate injury did result to petitioner by reason thereof; that said acts were based upon the decision that petitioner was in default, whereas, in truth and in fact, no such default existed on the part of the petitioner.

The complaint prays:

(a) to declare the said action and decision of respondents to be null and void and to set the same aside as arbitrary, capricious and so grossly erroneous as necessarily to imply bad faith and contrary to the substantial facts;

(b) that said respondents be permanently enjoined from accepting and acting upon any bids received upon the invitation of February 5, 1959, aforesaid;

(c) from interfering with petitioner's performance of its contract;

(d) to assess and ascertain the damages of the petitioner by reason of the aforesaid action of the respondents and to direct them to approve the same for payment.

Argument

It appears to petitioner that there was a gross injustice done in misreading the foregoing complaint as if it were a contract action against the United States Government, instead of a simple proceeding to review agency action with which petitioner felt aggrieved. Petitioner contends further as required in Rule 23(g) of the Rules of this Court that the Court of first instance has jurisdiction, because a federal question arises as provided by 28 U.S.C.A. 1331.

There are important questions of federal law which have not been decided but should be decided by this Court. The Court of Appeals relied upon Section 10(c) of the Administrative Procedure Act [5 U.S.C.A. 1009(c)] as providing for an exception to a review of agency action where there is "some 'other adequate remedy in any court'." There has been no decision in this Court considering the aforesaid wording of Section 10(c). The interpretation by the Court of Appeals deprives the petitioner of a judicial review of the agency action complained of, in spite of the fact that it was conceded that petitioner was an aggrieved party.

It is contended by the petitioner that the Court of Appeals to narrowly interpreted the provisions of Section 10(e) and misconstrued the legislative history of Section 10(e). It is made manifest by that legislative history that Section 10(e) does not serve to limit or exempt from judicial review agency action simply because that agency action might give rise to a suit in the Court of Claims under the Tucker Act. Instead, the legislative history shows that Section 10(e) was meant to define the "finality" of agency actions so as to qualify them for judicial review.

POINT I

Judicial review or unconsented suit.

By this suit, petitioner sought a judicial review of Brennan's decision of January 12, 1959. The complaint states in its first paragraph that this action was brought under 5 U.S.C.A. 1009, known as the Administrative Procedure Act. The title shows that the respondents are being sued as representatives of the General Services Administration. The complaint states a cause of action in equity seeking injunctive relief as well as a declaration and a judicial determination that Brennan's said action of January 12, 1959, be declared null and void for being arbitrary, capricious and so grossly erroneous as necessarily to imply bad faith and contrary to the substantial facts.

The complaint also states that Brennan's said act of cancelling the contract was without reason or justification, capricious and arbitrary and contrary to the actual facts. No denial of the allegations has been attempted by respondents. The dismissal of the complaint was on a motion to dismiss under Rule 12 of the Federal Rules of Civil Procedure. Affidavits were submitted but the foregoing statements of the complaint remain uncontradicted. Hence, the foregoing facts are to be taken as true by this Court.

Anti-Fascist Committee v. *McGrath*, 341 U. S. 123, 126.

Consequently, it would appear, on the surface, that petitioner having brought this action under 5 U.S.C.A. Section 1009 for a judicial review, that error below was committed in holding that petitioner was not seeking a judicial review but a money judgment against the United States.

The Court of Appeals' justification for its decision is found in the fact that after the commencement of this action, the General Services Administration, re-let the job to others, awarded the contract to another, and allowed that successful bidder to enter upon the job and re-do the job and finally accepted and paid for that other job. These facts were concluded after decision by the District Court and they were submitted on the argument of the appeal to the Court of Appeals, in affidavit form. Thus, they formed the basis of an argument by the United States Attorney that because the injunctive features of this case are now moot, the only relief remaining in the declaration is the demand to invalidate Brennan's action of cancellation and the direction to him to approve the payment of what is found due the petitioner if said action of Brennan is found invalid. The Court of Appeals adopted that argument for its decision.

It was error for the Court of Appeals to so hold:

(a) because once a District Court has equity jurisdiction, it may decide all questions under consideration as the exigencies of the case requires.

(b) a breach of contract suit under the Tucker Act, does not defeat the petitioner's right to judicial review of the Administrative Act; the same act might aggrieve petitioner so as to entitle it to a judicial review and at the same time, give rise to a contract action against the principal under the Tucker Act, 28 U.S.C.A. 1346(2).

The second of the reasons, it is submitted, involves an important question of Federal law which has not been

before this Court for determination. The preliminary question of whether petitioner has a right to a judicial review of Brennan's action (leaving aside for the moment, the question of finality), it is submitted, should be answered in the affirmative.

Harmon v. *Brucker*, 355 U. S. 579;
Anti-Fascist Committee v. *McGrath*, 341 U. S. 123, 140;
Shaughnessy v. *Pedeiro*, 349 U. S. 48;
Brownell v. *Tom We Shung*, 352 U. S. 180;
United States v. *Smith*, 256 U. S. 11;
Adams v. *Witmer*, 271 Fed. (2) 29.

In *Harmon* v. *Brucker*, *supra*, this Court stated at pages 581-582, "Generally, judicial review is available to one who has been injured by an act of a government official which is in excess of his express or implied authority." The type of discharge from the Army was involved in this case. The Army had issued a "dishonorable" discharge to petitioner taking into account certain pre-induction activities of the petitioner. Petitioner alleged that the discharge should have been according to the activities of petitioner during military services only. As the form of discharge was of some importance to petitioners, it was held that they were aggrieved by the form of discharge actually issued. The allegation was made that respondents had acted in excess of their authority. This Court held for petitioner, held that the District Court had properly exercised its jurisdiction and directed judgment accordingly.

In *Adams* v. *Witmer*, *supra*, the Court of Appeals for the 9th Circuit relying upon this Court's decision in *Harmon* v. *Brucker*, stated that the wrongful exercise of agency action is reviewable by the District Court, if the plaintiff had become adversely affected by said action.

In *Anti-Fascist Committee* v. *McGrath*, *supra*, at page 140, this Court held that defaming petitioner, unlawfully, as charged in the complaints, resulting in the irreparable injury to petitioner, as set forth in their complaints, showed petitioners to be entitled to a judicial review, this Court saying:

> "Finally, the standing of the petitioners to bring these suits is clear. The touchstone to justiciability is injury to a legally protected right * * *".

Again, in *Anti-Fascist Committee* v. *McGrath*, this court, through Mr. Justice Frankfurter, delineates the circumstances under which this is said to be a "case or controversy" and one of such admittedly sufficient factors is injury which if caused by a private person, "would create a right of action cognizable by the courts.". See page 152.

In *Shaughnessy* v. *Pedreiro* and in *Brownell* v. *Tom We Shung*, *supra*, this court apparently removed any doubt of the availability of the Administrative Procedure Act for the review of wrongful agency action at the instance of the party aggrieved.

The legislative history of the 79th Congress says of Section 1009 at page 37 that if a party can show that he is "suffering legal wrong" he is entitled to judicial redress.

> *Senate Document No. 248;*
> cf. *Administrative Procedure Act; Summary and Analysis, Bureau of National Affairs*, pp. 32-35.

In the case at bar, the complaint shows, clearly and unequivocally, the transgression by Brennan in going beyond his authority in capriciously and arbitrarily deciding against the facts, intentionally to hurt petitioner. It shows that petitioner's right to conclude the contract was unlawfully interfered with by the decision complained of, that irreparable damage was occasioned because plain-

tiff's right to proceed with the job pending the appeal to the head of the department was denied, that the terms of the invitation for bids to conclude the job provided for an unlawful disposition of the materials and equipment of the petitioner in a manner which would even destroy evidence to support petitioner's claim of 80% completion. Hence, it is submitted that petitioner submits a "case or controversy" justiciable beyond doubt.

The Court of Appeals' insistence upon calling this suit an unconsented suit against the United States is therefore error. A judicial review, under the Administrative Procedure Act is and should be considered as an authorization by Congress that parties aggrieved by administrative action may obtain a judicial review under the act. The 9th Circuit Court of Appeals, in *Adams* v. *Witmer*, said as much. At pages 34-35 the following appears:

> "This express authorization of judicial review in this case disposes of the argument that the suit is in substance one against the United States where the United States has not given its consent to be sued. The United States has consented to this review. The fact that the United States has some interest in the controversy does not provide an exception to the grant of a right of review.
>
> The proceeding here is 'an action' only in a formal sense. In reality it is a petition for review. Section 10(b) describes the appropriate forms for such proceedings. One of those permissible forms is through the use of a legal action 'including action for declaratory judgments or writs of prohibitory or mandatory injunction.' The consent of the United States to the utilization of this form of proceeding is all that is required."

Thus there appears to be a conflict, in principal, between the Second Circuit and the Ninth Circuit on the question of consent and on the effect to be given to the interest of

the United States in the proceeding. This conflict of judicial views should be resolved by this court and that resolution should be in favor of petitioner as the decision in the Second Circuit appears to be based on cases antedating the decisions of this court in *Harmon* v. *Brucker*, *Anti-Fascist Committee* v. *McGrath*, *Shaughnessy* v. *Pedeiro* and *Brownell* v. *Tom We Shung*, and the decision of the Court of Appeals in *Adams* v. *Witmer*. These cases appear to have set a broad line of hospitable interpretation for the Administrative Procedure Act, granting the District Court jurisdiction to review administrative action.

The only decision of this court relied upon by the Court of Appeals in this case is *Mine Safety Co.* v. *Forrestal*, 326 U. S. 371, which does not involve a judicial review under the Administrative Procedure Act. Furthermore, the decision of this court in *Mine Safety Co.* v. *Forrestal* was placed upon the indispensability of the Government in that suit, which indispensability is not present here. In this case, indispensability was relied upon by the District Court but upon appeal the United States Attorney abandoned the grounds of the District Court's decision and pressed the grounds adopted by the Court of Appeals. In its decision, the Court of Appeals expressly stated that it placed its decision on grounds different from those of the District Court.

Nor are *Aktiebolaget Bofors* v. *United States*, 194 Fed. (2) 145; *McKay* v. *Central Electric Power Cooperative*, 223 Fed. (2) 623; *Kansas City Power & Light Co.* v. *McKay*, 225 F. (2) 924 and *Almour* v. *Pace*, 193 F. (2) 699 controlling. The *Almour* case concerns the specific provision of 28 U.S.C.A. 1346 (d) which precludes the District Courts from jurisdiction to decide pensions, salaries, etc., of officers in the armed forces of the United States. If anything the case supports petitioner in citing instances where an aggrieved party may press a right even though it is tied in with a monetary claim against the United States.

The *Kansas City Power & Light Co.* case goes on the premises that the plaintiff was not an aggrieved party.

The *Central Electric Power Cooperative* case also held that none of plaintiff's rights were violated.

The complaint in *Aktiebolaget Bofors, supra*, was upon the contract of the plaintiff with the United States, whereas petitioner here claims that the action of Brennan should be reviewed and annulled. The fact remains that petitioner seeks a determination concerning the validity of Brennan's action and not a declaration of its right under its contract with the government. Hence, we see that the Court of Appeals erred in disregarding the plain intent of the petitioner's complaint, relying upon authorities which are not dispositive of the issues here but which are in conflict with decisions of this court on the point.

The citation of *Smith* v. *U. S., supra*, was made to show that even before the passage of the Administrative Procedure Act, an action was maintainable in the Federal Courts to review the arbitrary actions of a contracting officer acting beyond the scope of his authority under construction contracts with the government.

Inasmuch as the Court of Appeals has stated that jurisdiction to review does not exist because Section 1009(c) of the Administrative Procedure Act excepts from review agency action for which there is some "other adequate remedy in any court", it behooves us to consider next that subsection. That subsection relates to "acts reviewable" and reads in part as follows:

> "(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review."

The Court of Appeals refused to acknowledge that petitioner was proceeding in equity seeking a judicial review.

It read the complaint solely as asking for a determination of petitioner's contract rights under its contract with the United States and then said that petitioner had an adequate remedy under the Tucker Act. If the 5th demand for relief in the complaint were read out of context, there may be some warrant for the Court of Appeals' position, but when read in context, with the explanatory affidavits which emphasized that petitioner was merely seeking a judicial review, then, the declaratory judgment sought is clearly seen as being limited to a review of Brennan's decision. This is not the same as asking for a declaratory judgment on the contract itself and asking for an award, as in a breach of contract action, in a suit against the principal in the Court of Claims. The Administrative Procedure Act does not expressly support the position of the Court of Appeals. Going further and saying that subsection (c) above quoted, deprives petitioner of a judicial review because petitioner has "some other adequate remedy in any court", referring to the Tucker Act, is to misread the effect of subsection (c). The legislative history of the wording of subsection (c) states that the words "no other adequate remedy" refers to the machinery within the administrative body; that is, whether it is the final act insofar as that administrative body is concerned. If there is a further administrative appeal available then there is an "adequate remedy" available. This reference makes it clear that subsection (c) refers to the finality of the administrative action sought to be judicially reviewed. Both the heading of the subsection reading "Acts Reviewable" and the remaining two sentences of this subsection which read:

> "Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not

> there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority."

supports this view that finality of the agency action is referred to by this subsection.

The construction placed upon this subsection by the Court of Appeals would deprive a citizen of the right to a judicial review of an unlawful agency action, a right which has been so carefully preserved by our courts of equity, even before the passage of the Administrative Procedure Act, and is now available by that statutory authority (The Administrative Procedure Act). Such a right of review is different from and is a right separate from the right to sue the principal for a breach of contract. A judicial review may be had in the home venue of the party affected, whereas a suit under the Tucker Act must be brought in Washington, D. C. The expenses and the inconveniences involved in a suit at Washington might very well turn a victory into an empty one.

Furthermore, a party's right of review in equity are rights by themselves enforceable in a court of equity.

> *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 183; *Utah Fuel Co.* v. *Coal Comm'n*, 306 U. S. 56, 60.

It was said in *Utah Fuel Co.* v. *Coal Comm'n*, at page 60, "The jurisdiction of a District Court is to be determined by the allegations of the bill, and usually if the bill or declaration makes a claim that if well founded is within the jurisdiction of the court, it is within that jurisdiction whether well founded or not'." The right to a judicial review in this case is founded upon Section 1009(a).

Therefore a Federal question is involved. In such a case as this, the District Court would have jurisdiction since the amount involved exceeds the jurisdictional amount.

28 U.S.C.A., Section 1331.

This is so, even if petitioner had not alleged irreparable damage in its complaint, but, the allegations of irreparable damage involve the equity jurisdiction of the District Court, a power not given to the Court of Claims and once that jurisdiction is had, the District Court will retain it to do complete justice.

Filson v. *Fountain*, 171 Fed. (2) 999, rev'd on other grounds 336 U. S. 681.

Furthermore, as the subsection deals with the defining of limits of finality as applied to agency action to be reviewed, it cannot be interpreted as depriving a party of an equitable right without more. To give the section such a disasterous effect, the subsection should have been clearly expressive of that limitation. At any rate, the subject of subsection (c) has never been considered by this Court. At least diligent search has revealed no cases considering this point in this court. Two Court of Appeals decisions have mentioned subsection (c). See *Consolidated Flowers Shipments* v. *Civil Aeronautics Board*, 205 F. (2) 449, 451 and *Richfield Oil* v. *U. S.*, 207 F. (2) 864. The *Consolidated* case considered the specific language under consideration. It said that in that suit which was against the United States Government no judicial review of a claim against the government could be had. Where, however, as here, the equity jurisdiction of the court has been invoked, the question is of first impression. It is of great importance, because we have here a clear case of violation of authority vitally affecting petitioner. This Court has said that parties aggrieved by agency actions act as

representatives of the public's interest in seeking judicial review.

> *Scripps-Howard Radio Inc.* v. *Fed. Comm. Commission*, 316 U. S. 4, 14-15;
> *Yakus* v. *U. S.*, 321 U. S. 414.

It is respectfully submitted that the interpretation which has been accorded to said subsection (c) is wholly at odds with the trend established by this court in granting and upholding the right of judicial review.

In *Shaughnessy* v. *Pedeiro* and in *Brownell* v. *Tom We Shung*, this Court recognized that petitioners had another remedy, the remedy of habeas corpus, available to them. This court refused to say that the availability of habeas corpus defeated those petitioners' right to a judicial review.

Petitioner was obliged to commence this action in the District Court because of the equity relief sought and since it also is given a right of judicial review, it properly brought this action.

POINT II

The agency action complained of was final for the purpose of a judicial review.

The Court of Appeals has said that this proceeding cannot be maintained because the dispute clause creates a mechanism for the adjustment and correction of errors which must be pursued before the contractor can be heard in court. This seemingly states a sound proposition but the facts and the law are not quite as stated.

The facts are that respondents' position has always been that Brennan's action was final. Respondents refused to allow petitioner to continue performance of the work pending the appeal on the ground that its decision was final. The Board of Review before which the appeal was

prosecuted stated that it had no power to decide anything in this case as the dispute was ended as far as the Government was concerned and it had no power or authority to direct or suggest the payment of unliquidated damages. Respondents furthermore demanded payment of the excess costs as determined by the new bidders' contract price.

Moreover, on this motion to dismiss, affidavits when received are considered to be received in amplification of the pleadings. Petitioner filed an affidavit in opposition to the motion which stated that respondents had stated that they considered the Brennan action of January 12, 1959, as the final action in the department and that the appeal to the head of the department which had been taken was but a futile gesture.

The Court of Appeals adopted the suggestion of the United States attorney made on the argument of the appeal that the appeal to the head of the department was a valid appeal which would afford petitioner an adequate remedy. The Court of Appeals completely disregarded the facts of the case, something it should not have done on a motion to dismiss.

It was even contradictory of the respondents' position on the facts in relation to the finality of the Brennan action. The Court declared that the dispute over the termination of the court was a dispute which petitioner was required to submit to the Administrator. It implied that the fact of termination was in dispute. The respondents on the other hand were quite definite that there was no dispute over the termination. They were definite that termination had become effective and final with the Brennan decision of January 12, 1959.

Nor is the law relied upon by the Court of Appeals sound and controlling. The cases cited refer to actions against the United States and not to proceedings for a judicial review, an essentially equitable action.

Petitioner had argued that not only was the court bound by the facts as alleged by petitioner, but also that the undisputed and admitted fact that petitioner was refused the right to continue performance of the contract pending the appeal to the head of the department failed to maintain the status quo and therefore according to the last sentence in the same subsection (c) of Section 1009, the act of Brennan would be considered to be the final action for the purpose of judicial review. The pertinent provision of said subsection (c) is, "* * * agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior authority." Thus we see that unless the action complained of is rendered inoperative pending an appeal to superior authority, that action will be considered final and subject to judicial review by the terms of the subsection. Again, this wording has never before been the subject of consideration by this court. It certainly affects the right of petitioner in a vital manner. The admitted fact is that the Brennan decision was not rendered inoperative. Hence, the pendency of the so-called appeal to the head of the department cannot be considered a prerequisite to a judicial review. This is not the case of where the review should be had because of the special expert knowledge of the administrative agency in a field requiring such expert knowledge, which a court could not ordinarily give. There is no statute requiring that the pending appeal should be had. Nor is there any necessity for expert administrative decision as the subject matter is one which is more familiar to courts than to administrative assistants involving as it does the usual determination of liability for acts.

The Court of Appeals also disregarded the effect of the Wunderlich Act, 41 U.S.C.A. 321. This statute would make impotent the pending appeal to the head of the

department because the head of the department could not decide the question of "fault" as that would be a conclusion of law to be decided by the courts. The only question that could be decided would be questions of fact. But since the General Services Administration had already stated that the Brennan action terminating the contract was a final termination of the contract and since the Board of Review of General Services Administration has taken the position that it cannot award damages even if they were to find the Brennan decision wrongful, there is nothing to be determined by the appeal pending in Washington and that proceeding has become futile.

The nub of exhaustion of remedy has been said to be whether the final act of the department has occured; i.e., finality within the department.

Cole v. Young, 226 F. (2) 337, 339.

Here, we not only have the express position of the department stating that the action of January 12, 1959 was the final action, they even proceeded to issue invitations to bid, accepted one and re-let the contract.

Also, we have the express definition of subsection (c) of Section 1009 as to what is "final" for purpose of a judicial review, which definition would disregard the pending appeal to the head of the department. Hence the Court of Appeals erred and this court is respectfully urged to grant this petition for a certiorari to that court to review said decision.

WHEREFORE, petitioner respectfully prays this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit to bring this matter up for review in this Court.

Respectfully submitted,

ANTHONY B. CATALDO,
Attorney for Petitioner.

Decision and Opinion of United States Court of Appeals for the Second Circuit.

Before:

LUMBARD, *Chief Judge*,

MEDINA, *Circuit Judge* and JAMESON, *District Judge*.*

Plaintiff appeals from a judgment of the United States District Court for the Southern District of New York, John M. Cashin, *J.*, dismissing his complaint for lack of jurisdiction over the subject matter and for improper venue as to an indispensable party.

Affirmed.

LUMBARD, *Chief Judge*:

In the spring of 1958 appellant, Ove Gustavsson Contracting Company, entered into an agreement with the United States to construct a building described as a dehumidification hutment to be used by the government for the storage of precision machinery. The contract price was $47,000 and the job was to be completed in October 1958. Work was not begun until November 1958, and on January 12, 1959, when the building was still uncompleted, Michael Brennan, contracting officer for the General Services Administration notified appellant that the government was terminating the contract because of the contractor's failure to complete the work satisfactorily. Within thirty days thereafter appellant appealed this decision of the contracting officer to the Administrator of the General Services Administration in accordance with the "disputes" provision of the contract between the parties; that appeal is still pending. In September 1959 another contractor completed construction of the hutment.

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* Sitting by designation.

Decision and Opinion of United States Court of Appeals for the Second Circuit.

Appellant brought this action in February 1959, naming as defendants Franklin Floete, Administrator of the General Services Administration, and Michael Brennan, contracting officer of the General Services Administration, who had signed the contract with appellant on behalf of the government. The complaint alleged that the jurisdiction of the district court was founded upon § 10 of the Administrative Procedure Act, 5 U. S. C. § 1009, and sought an injunction against the awarding of another contract for completion of the hutment, a declaratory judgment that the government's contract with appellant was still in full force and effect and that its termination was unlawful, and damages. The district court denied a preliminary injunction, and, since the hutment is now completed, the claim for injunctive relief is now moot. Thereafter, defendants moved for dismissal of the complaint under Rule 12(b) of the Federal Rules of Civil Procedure. The district court held that Floete was an indispensable party to the action and that venue as to him was improper. It also held as to defendant Brennan that there was no diversity of citizenship and that no other basis of federal jurisdiction was shown. The court dismissed the complaint. We affirm the judgment, though we place our decision on grounds different from those of the district court.

Although the appellant stated in his complaint that the suit is against two government officials in their individual capacity, the action is in reality against the United States. A request for a declaratory judgment upon a contract to which the government is a party is plainly a request for relief against the United States. *McKay* v. *Central Elec. Power Co-op.*, 223 F. 2d 623 (D. C. Cir. 1955); *Aktiebolaget Bofors* v. *United States*, 194 F. 2d 145 (D. C. Cir. 1951). The claim for damages seeks an award for breach of contract by the United States; appellee Brennan signed the contract only as an authorized representative of the United

States and would not be personally liable for any breach. Any damages awarded would be payable from the Treasury of the United States. The suit is one "to collect a debt allegedly owed by the government," *Mine Safety Co.* v. *Forrestal*, 326 U. S. 371, 375 (1945), and consequently must comply with the requirements for such suits. One such requirement imposed by Congress under the Tucker Act, 28 U. S. C. § 1491, is that when the amount sought from the government for an asserted breach of contract exceeds $10,000, suit must be brought in the Court of Claims. Since the damages sought here exceed $10,000, the district court lacked jurisdiction to entertain the suit, even had the United States been made a party and properly served with process. 28 U. S. C. § 1346(a)(2).

Appellant seeks to avoid this result by characterizing his suit not as an ordinary action upon a contract, but as one "to review, judicially, the action of an agency of the United States" pursuant to § 10 of the Administrative Procedure Act. It is true that § 10(a) states that "any person suffering legal wrong because of any agency action . . . shall be entitled to judicial review thereof." However, neither this provision nor any other clause of § 10 extends the jurisdiction of the federal courts to cases not otherwise within their competence. *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 932-33 (D. C. Cir.), cert. denied, 350 U. S. 884 (1955); *Aktiebolaget Bofors* v. *United States*, *supra*; *Almour* v. *Pace*, 193 F. 2d 699 (D. C. Cir. 1951). The purpose of § 10 is to define the procedures and manner of judicial review of agency action, rather than to confer jurisdiction upon the courts. Moreover, § 10(c) of the Act itself excepts from review under the section agency action for which there is some "other adequate remedy in any court." Suit under the Tucker Act in the Court of Claims provides an adequate remedy for appellant and precludes his reliance on § 10.

There is a further reason why the judgment should be affirmed. Under the disputes clause of his contract with the government appellant agreed that disputes not settled with the contracting officer would be referred to the Administrator of the General Services Administration. Such an appeal was taken in this case and is still pending. The dispute over termination of the contract is one appellant was required to submit to the Administrator under the contract, and until the administrative appeal process has been completed appellant is not entitled to pursue his legal remedies in court. *United States* v. *Joseph A. Holpuch Co.*, 328 U. S. 234, 239-40 (1946); *United States* v. *Blair*, 321 U. S. 730 (1944). Mr. Justice Murphy stated in the *Holpuch* case:

> "[The disputes clause] creates a mechanism whereby adjustments may be made and errors corrected on an administrative level, thereby permitting the Government to mitigate or avoid large damage claims that might otherwise be created. • • • This mechanism, moreover, is exclusive in nature. Solely through its operation may claims be made and adjudicated as to matters arising under the contract. • • • And in the absence of some clear evidence that the appeal procedure is inadequate or unavailable, that procedure must be pursued and exhausted before a contractor can be heard to complain in a court." 328 U. S. at 239-40.

This statement is equally true of the "disputes" clause in the contract involved in the case before us. Since the administrative process has not been completed, the appellant may not come into court.

Affirmed.

Decision on Petition for Rehearing.

Anthony B. Cataldo, New York, N. Y.,
for Plaintiff-Appellant.

The petition is denied.

J. E. L.,
U.S.C.J.

H. R. M.,
U.S.C.J.

W. J. J.,
U.S.D.J.

JUN 15 1960

Judgment of Affirmance.

Plaintiff having appealed from the judgment of this Court in favor of the defendants, which judgment was entered on June 16, 1959, and said appeal having been heard and considered by the United States Court of Appeals for the Second Circuit, and the Court of Appeals having affirmed the said judgment of this Court, and plaintiff having filed a petition for rehearing, and the Court of Appeals having denied said petition for rehearing, and the judgment of the Court of Appeals having been received and filed by the Clerk of this Court on June 16, 1960.

* * * * * *

ORDERED that the aforesaid judgment of the Court of Appeals be made the judgment of this Court.

Dated: New York, New York, July 15, 1960.

EDMUND L. PALMIERI,
U. S. D. J.

JUDGMENT ENTERED:

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HERBERT A. CHARLSON
Clerk

July 15, 1960.

Affidavit of Anthony B. Cataldo, in Support of Petition for Rehearing.

* * * * * *

Your deponent duly filed the said appeal on February 5, 1959 and he demanded for the appellant the right to proceed with the contract pending the dispute. Such right to proceed with the work was denied by respondent Brennan. This refusal was implemented by counsel for the General Services Administration, one Mr. Cirillo, who stated to deponent that appellant's contract had been terminated by Brennan's letter of January 12, 1959 and there was no longer any contract under which a dispute could be adjusted by the head of the department. No action was taken by the head of the department until November, 1959 when the first hearing was held on November 10, 1959. Present at that hearing were James T. Gobbel and James F. Lynn, members of the Board of Review; Leo Freeman, office of General Counsel, representing the Government and deponent among others.

When deponent had gotten to the point of proving the appellant's damages arising out of Brennan's action of January 12, 1959, the Board of Review advised deponent that such matters were irrelevant and immaterial to the inquiry before the Board, as the Board had no power to deal with damages. Yet, that was the only issue left for determination. The following is the colloquy occurring which brought out this lack of authority on the part of the Board:

> "Mr. Cataldo: Now, Mr. Gustavsson, will you please tell us the cost to you of the operation of this job? Take the various materials and go down the line and then give me the labor.
>
> Mr. Freeman: I'm going to—
>
> Mr. Gobbel: May I say this, without hearing your objection, Mr. Freeman because I know your

point: We're perfectly willing for you to give a figure, a total figure, here. And the reason for it is this: That the Administrator and the Board of Review do not have authority to approve claims for unliquidated damages.

* * * * * * *"

Deponent would have presented these facts on the consideration of this appeal but for the fact that he had no knowledge of the intention of the Government to claim that the conclusion of the appeal was a necessary prerequisite to appellant's suit. In fact, he received knowledge of the contents of respondent's affidavits only after he had argued this appeal. Deponent had received copies of such affidavits as he was about to address the court to argue for appellant. He therefore could not decide appellant's course in respect thereof. Furthermore, the court (Judge Medina) stated that facts of the case would have no bearing upon the question of jurisdiction and (Judge Lumbard) that there could not be any contradictions of the fact of appeal at Washington or of the cancellation of the contract. Both statements dissuaded deponent from making this affidavit. Deponent was therefore surprised that this court took such serious a view of the pending appeal. The whole thing would not have happened if the United States Attorney had been fair about the presentation of this matter. Said attorney must have known for a long time before the argument of the appeal what course he was to follow. He followed an entirely new course of attack upon the complaint. Appellant had devoted most of its attack upon the decision below, upon the grounds of that decision. When the United States Attorney abandoned those grounds as support and attacked the complaint upon other grounds, there was not enough notice to appellant. Not enough study

was made of such new grounds of attack." Appellant did not have enough time to meet such new attack. The affidavit of Mr. Kurth was sworn to the 15th day of April, 1960. The affidavit of Mr. Brennan was sworn to the 19th day of April, 1959. This appeal was argued May 4th, 1960. Why weren't copies served on deponent until he had started the argument on May 4th, 1960?

* * * * * *